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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Theodore R Rushing,
10 Petitioner,

11 v.

12 Charles L Ryan, et al.,
13 Respondents.
14

No. CV-15-02484-PHX-ROS

ORDER

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16 On May 2, 2017, Magistrate Judge John Z. Boyle issued a Report and
17 Recommendation (“R&R”) recommending the petition for writ of habeas corpus be
18 denied. Petitioner filed objections to the R&R as well as a motion to stay further
19 proceedings while he returned to state court to exhaust certain claims. Petitioner’s
20 objections are without merit and it would be futile for him to return to state court.
21 Therefore, the R&R will be adopted in full and the petition dismissed with prejudice.

22 The R&R recounts the background concerning Petitioner’s criminal trials and his
23 post-trial filings. Petitioner did not object to that background and the Court will adopt it
24 in full. In brief, Petitioner shot and killed an individual during an altercation in a parking
25 lot. Petitioner was charged with first-degree murder and five counts of aggravated
26 assault. At the end of his original trial, the jury convicted Petitioner of three counts of
27 aggravated assault and one count of the lesser-included offense of disorderly conduct.
28 The jury acquitted Petitioner of one count of aggravated assault. The jury could not,

1 however, reach a verdict on the murder charge. Petitioner was then retried on the murder
2 charge and he was convicted of the lesser-included offense of manslaughter. Petitioner
3 was sentenced to the presumptive sentence for the manslaughter conviction and mitigated
4 terms on the other convictions. Because the trial court ordered the sentences to run
5 consecutively, Petitioner's total sentence was approximately twenty-five years.

6 Petitioner filed a direct appeal but his convictions and sentences were affirmed.
7 Petitioner also filed three petitions for post-conviction relief in state court, none of which
8 were successful. Petitioner eventually filed this federal petition, asserting seven grounds
9 for relief. The R&R concludes a few of those grounds were not exhausted but, even if
10 the merits could be reached on all of the grounds, none of them meet the high bar for
11 obtaining relief. Petitioner filed objections, largely rearguing the positions he asserted in
12 his petition. Petitioner also filed a motion seeking to stay these proceedings while he
13 returned to state court to exhaust some of his grounds.

14 **I. Ground One—Juror Qualification**

15 Petitioner's first ground for relief involves one of the trial jurors allegedly being
16 unqualified to sit on one of the juries. The R&R construes this claim as exhausted and
17 analyzes it on the merits. The R&R describes Petitioner as arguing the juror was not a
18 resident of Maricopa County and, therefore, was ineligible to sit based on Arizona law.
19 The R&R concludes that is not a viable basis for federal habeas relief. In his objections,
20 Petitioner explains the R&R misinterprets his argument. Petitioner explains he is not
21 arguing the juror's presence violated Arizona law but that the juror's presence meant
22 Petitioner was "denied the right of a 12 person jury." (Doc. 55 at 4). Regardless of
23 Petitioner's exact claim, he is not entitled to relief.

24 The R&R correctly concludes Arizona law, not federal law, required the trial
25 jurors be residents of Maricopa County. This argument likely is unexhausted but the
26 Court can reject the argument on its merits notwithstanding the exhaustion issue. 28
27 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the
28 merits, notwithstanding the failure of the applicant to exhaust the remedies available in

1 the courts of the State.”). Petitioner has not cited any federal law imposing such a
2 residency requirement. Moreover, federal law states a potential defect in a juror’s
3 qualification to sit does not impact the validity of the verdict. Thus, even assuming the
4 juror was not qualified to sit based on residency, that is not a basis for relief. *See Kohl v.*
5 *Lehlback*, 160 U.S. 293, 301 (1895) (juror’s lack of citizenship did not violate federal
6 constitution).

7 As for Petitioner’s argument that the Sixth Amendment required a twelve-person
8 jury, that is incorrect. Again, this argument likely is unexhausted but it is easiest to
9 address it on the merits. “[U]nder the Sixth Amendment to the United States Constitution
10 a defendant in a criminal case has a right to a jury trial, but that does not even mean that a
11 state is required to use the traditional twelve-person jury. Variations are permitted.”
12 *Lambright v. Stewart*, 191 F.3d 1181, 1184 (9th Cir. 1999). Provided a criminal jury
13 consisted of at least six persons, there is no federal constitutional issue. *Id.* Under
14 Petitioner’s own argument, his jury had eleven persons. Therefore, even assuming
15 Petitioner was only convicted by a jury of eleven persons, that does not establish a
16 violation of his federal rights.

17 **II. Ground Two—Aggravated Sentence**

18 Petitioner’s second ground for relief involves his belief that his sentences violated
19 federal law because the trial court’s sentencing decision was based on aggravating factors
20 not found by the jury. In addressing this argument, the Arizona Court of Appeal
21 explained why it was baseless: “The obvious flaw in [Petitioner’s] argument is that the
22 trial court did not impose any aggravated sentences; [Petitioner] received a presumptive
23 prison term on the manslaughter conviction and mitigated prison terms on his other
24 convictions.” *State v. Rushing*, No. 1 CA-CR 09-0601, 2011 WL 5299384, at *7 (Ariz.
25 Ct. App. Nov. 3, 2011). The R&R believes this claim should be addressed on the merits
26 but agrees with the Arizona Court of Appeals there was no sentencing error because
27 Petitioner did not receive aggravated sentences.

28 In his objections, Petitioner seems to make two arguments. First, he claims the

1 trial court found aggravating circumstances that “removed the possibility of receiving the
2 minimum sentence.” (Doc. 55 at 5). And second, the trial court impermissibly found
3 aggravating factors to justify imposition of consecutive sentences. Neither argument is
4 persuasive.

5 On the first argument, Petitioner has not established imposition of a presumptive
6 sentence violated his federal rights. Upon being convicted of manslaughter, Petitioner
7 was eligible for the presumptive 10.5 year sentence. The trial court imposed that
8 sentence and the failure to impose less than the presumptive raises no federal
9 constitutional issue. In other words, upon being convicted of manslaughter Petitioner
10 was exposed to a sentence of 10.5 years without the need for any additional factual
11 findings. The fact that Petitioner received that sentence, instead of a lesser sentence, does
12 not violate federal law. *Cf. Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013) (trier
13 of fact must find “any facts that *increase* the prescribed range of penalties to which a
14 criminal defendant is exposed”) (emphasis added).

15 On the second argument, Petitioner claims the trial court found aggravating
16 circumstances and then relied on that to impose consecutive, instead of concurrent,
17 sentences. But the decision whether to impose consecutive or concurrent sentences is
18 within the trial court’s discretion. *State v. Cota*, 272 P.3d 1027, 1043 (Ariz. 2012). And
19 there is no federal right to have that discretion exercised in a particular way. Thus, the
20 decision to impose consecutive sentences is not a basis for relief.

21 **III. Ground Three—Impeachment by Convictions**

22 Petitioner’s third ground involves use of his convictions from the first trial to
23 impeach his testimony during the second trial. The R&R concludes this ground was
24 unexhausted and, in any event, fails under existing law. In his objections, Petitioner does
25 not establish this ground was exhausted. Instead, he focuses on his argument that the
26 state’s use of his convictions was improper.

27 The R&R is correct that this ground was unexhausted and, therefore, Petitioner is
28 not entitled to relief. But even if it had been exhausted, the fundamental flaw in

1 Petitioner's argument is that, as of his second trial, he had been convicted of the crimes
2 used to impeach his testimony. Having been convicted, the state was free to use those
3 crimes to impeach his testimony. *See United States v. Smith*, 623 F.2d 627, 630 (9th Cir.
4 1980) (permissible to use convictions for impeachment despite convictions not yet being
5 final). There is no bar on using non-final convictions to impeach a witness. Petitioner is
6 not entitled to relief on this ground.

7 **IV. Grounds Four and Six—Prosecution's Comments**

8 Petitioner's fourth ground involves allegedly improper statements by the
9 prosecutor during closing arguments and his sixth ground involves statements by the
10 prosecutor during trial that Petitioner had a duty to retreat. The R&R concludes both of
11 these grounds fail on their merits. Petitioner's objections do not identify any error in the
12 R&R's analysis.

13 As explained by the Supreme Court, "a prosecutor's improper comments will be
14 held to violate the Constitution only if they so infected the trial with unfairness as to
15 make the resulting conviction a denial of due process." *Parker v. Matthews*, 567 U.S. 37,
16 45 (2012) (quotation marks and citation omitted). The statements at issue fell well short
17 of this demanding standard as they were made, in part, to respond to Petitioner's own
18 arguments during trial. And even accepting Petitioner's current position that the
19 comments were in error, they were a very small portion of the trial and cannot be viewed
20 as "infect[ing] the trial with unfairness." *Id.* The statements, therefore, are not a basis for
21 relief.

22 **V. Ground Five—Exclusion of Evidence**

23 Petitioner's fifth ground involves the trial court's refusal to admit evidence
24 regarding the victim's tattoo or prior convictions for armed robbery. The R&R concludes
25 this claim was unexhausted but also fails on its merits. Petitioner's objections address the
26 exhaustion issue by claiming he "assumes" his appellate counsel exhausted this claim.
27 As for the merits, the objections state the R&R misconstrues the basis on which
28 Petitioner sought to introduce the evidence.

1 Petitioner’s assumption regarding exhaustion is incorrect. There is no indication
2 counsel presented the exclusion of the evidence as a matter of federal law. (Doc. 13-2 at
3 266). Therefore, the ground is unexhausted. But even if it had been exhausted, the
4 ground fails. Regardless of why Petitioner wished to introduce the tattoo and prior
5 convictions, Petitioner has not identified any Supreme Court authority mandating the
6 admission of this evidence. Therefore, Petitioner is not entitled to relief. *See, e.g., Moses*
7 *v. Payne*, 555 F.3d 742, 757 (9th Cir. 2009) (Supreme Court has not established a
8 “controlling legal standard” for admission of certain evidence where trial court must
9 exercise its discretion).

10 **VI. Ground Seven—Lesser-included Offense**

11 Petitioner’s seventh ground involves the trial court’s failure to instruct the jury
12 regarding a lesser-included offense. The R&R concludes this claim was unexhausted and
13 fails on the merits. The objections claim the ground was exhausted and that the R&R
14 again misconstrued the argument Petitioner is attempting to make.

15 Having reviewed the record, Petitioner did not exhaust this claim. Thus, the Court
16 need not address the merits. But assuming it had been exhausted, Petitioner is not
17 entitled to relief. According to Petitioner, the trial court erred by giving a lesser-included
18 instruction or, in the alternative, the trial court erred by not giving every possible lesser-
19 included instruction. Petitioner does not cite any authority establishing it violated his
20 federal rights for the trial court to instruct the jury on a lesser-included offense. And to
21 the extent Petitioner believes other lesser-included instructions should have been given,
22 “the failure of a state trial court to instruct on lesser included offenses in a non-capital
23 case does not present a federal constitutional question.” *Windham v. Merkle*, 163 F.3d
24 1092, 1106 (9th Cir. 1998). Thus, Petitioner is not entitled to relief on this ground.

25 **VII. Stay for Further Exhaustion**

26 Petitioner filed a motion seeking a stay of these proceedings while he returned to
27 state court to exhaust some of his grounds. The Court has discretion to stay proceedings
28 in such circumstances. *Rhines v. Weber*, 544 U.S. 269, 276 (2005). But a stay is

1 appropriate “only in limited circumstances” where “there was good cause for the
2 petitioner’s failure to exhaust his claims first in state court.” *Id.* at 277. Petitioner has
3 not established good cause to impose a stay. Moreover, any return to state court would
4 be futile in that the grounds at issue will be procedurally barred. Thus, rather than
5 returning to state court to attempt to exhaust, Petitioner should have attempted to
6 establish cause and prejudice to allow for consideration of his grounds. *See Cooper v.*
7 *Neven*, 641 F.3d 322, 327 (9th Cir. 2011) (“[I]f a claim is unexhausted but state
8 procedural rules would now bar consideration of the claim, it is technically exhausted but
9 will be deemed procedurally defaulted unless the petitioner can show cause and
10 prejudice.”). In any event, the Court has determined all of Petitioner’s grounds fail on
11 their merits, rendering the exhaustion issue irrelevant. In these circumstances, no stay is
12 appropriate.

13 **VIII. Summary**

14 Many of Petitioner’s grounds for relief are unexhausted and he has not established
15 any plausible basis to excuse his failure to exhaust. But even overlooking the exhaustion
16 issue and addressing the grounds on their merits, Petitioner has not established a violation
17 of federal law. Given that all his grounds fail regardless of the exhaustion issue, there is
18 no need to stay this case.

19 Accordingly,


20 **IT IS ORDERED** the Report and Recommendation (Doc. 51) is **ADOPTED IN**
21 **FULL**. The petition for writ of habeas corpus is **DENIED**. The Clerk of Court shall
22 enter judgment in favor of Respondents.

23 **IT IS FURTHER ORDERED** the Motion to Stay (Doc. 54) is **DENIED**.

24 **IT IS FURTHER ORDERED** that a Certificate of Appealability and leave to
25 proceed in forma pauperis on appeal are **DENIED** because dismissal of portions of the
26 petition is justified by a plain procedural bar and jurists of reason would not find the
27 procedural ruling debatable and other portions of the petition do not make a substantial
28 showing of the denial of a constitutional right.

1 **IT IS FURTHER ORDERED** the Motion to Publish (Doc. 43) is **GRANTED**.

2 Dated this 22nd day of November, 2017.

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6 Honorable Roslyn O. Silver
7 Senior United States District Judge
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